

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

January 22, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 96-2972**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN EX REL. CLE A. GRAY, JR.,**

**PETITIONER-APPELLANT,**

**v.**

**DONALD GUDMANSON AND MARTIN SCHROEDER,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J. and Roggensack, J.

PER CURIAM. Cle A. Gray, Jr., an inmate at Oshkosh Correctional Institution (OCI) during all times relevant to this case, appeals from an order of the circuit court affirming the decision of the adjustment committee. We also affirm because we reject Gray's claim that the adjustment committee failed to act impartially, and because we conclude that the confidential informants'

statements considered by the committee were sufficient evidence from which the committee could find Gray guilty.<sup>1</sup>

## BACKGROUND

By a conduct report dated May 23, 1995, Gray was charged with violating WIS. ADM. CODE §§ DOC 303.12 (battery), 303.21 (conspiracy), 303.20 (group resistance and petitions) and 303.40 (unauthorized transfer of property). The report was based on an investigation by Lt. Weisgerber which concluded that on the afternoon of May 10, 1995, Gray was one of six gang-affiliated inmates who targeted a seventh inmate, pushing and grabbing him for violating a gang precept about prison behavior. The report noted discovery of Gray's padlock in another inmate's cell<sup>2</sup> as evidence of coordinated activity.

Gray waived a full due process hearing under WIS. ADM. CODE § DOC 303.78, and instead received an informal hearing under § DOC 303.76(2). Gray argued that he was not part of the battery because he was at the opposite end of the yard. Based on the conduct report, the investigative report, confidential informants' statements and Gray's own statements, the committee found him not guilty of battery, but guilty of the remaining charges.

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<sup>1</sup> The State argues that we should consider whether Gray failed to exhaust his administrative remedies. However, because we dispose of this appeal on the merits, we find it unnecessary to consider this argument. *Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

<sup>2</sup> Apparently, the padlock had at one point been fashioned into a weapon called a lock-in-a-sock.

## DISCUSSION

### Standard of Review.

Judicial review in *certiorari* actions is limited to determining whether the administrative hearing committee kept within its jurisdiction, whether it proceeded on a correct theory of law, whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment, and whether the evidence was such that the committee might reasonably make the determination in question. As to the last criteria, the test is whether reasonable minds could arrive at the same conclusion reached by the administrative tribunal. *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 131 Wis.2d 101, 120, 388 N.W.2d 593, 600 (1986). *See also Van Ermen v. DHSS*, 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978) (same standard applies on appellate review). A reviewing court on *certiorari* does not weigh the evidence presented to the adjustment committee. *Id.* Our inquiry is limited to whether any reasonable view of the evidence supports the committee's decision. *State ex rel. Jones v. Franklin*, 151 Wis.2d 419, 425, 444 N.W.2d 738, 741 (Ct. App. 1989).

### Committee Prejudice.

Citing WIS. ADM. CODE § DOC 303.82(2), Gray argues that respondent Captain Schroeder, who served on the committee, was biased against him because Schroeder is OCI's chief gang investigator and conducted the investigation here. We reject this argument on two grounds.

First, as Gray acknowledges, WIS. ADM. CODE § DOC 303.82(2) prohibits those who have "personally observed or been a part of an incident which

is the subject of a hearing” from serving on a disciplinary committee. However, even accepting Gray’s contention that Schroeder conducted the investigation, the record contains no evidence that Schroeder “personally observed” or was “part of an incident.” See also *Merritt v. De Los Santos*, 721 F.2d 598, 601 (7th Cir. 1983) (“the requirement of impartiality mandates the disqualification of an official who is directly ... or ... substantially involved in the incident but does not require the disqualification of someone tangentially involved.”) Investigation of the incident does not disqualify Schroeder. *Id.*

Second, the record contains no evidence that Schroeder conducted the investigation. Gray has submitted a memo outside the record indicating that Schroeder took part in the investigation, but the State counters with another memo, also outside the record, indicating that Schroeder was not involved, and that Lt. Weisgerber conducted the investigation. In addition, the investigative report, which is part of the record, is signed by Weisgerber, with no indication of involvement by Schroeder.

### **Sufficiency of the Evidence.**

Gray argues that the committee found him guilty on insufficient evidence. He argues that the confidential informants’ statements are unworthy of belief and that no finding was made to sustain their veracity. In prior proceedings, he also argued that the statements are contradictory.<sup>3</sup>

Under *Mendoza v. Miller*, 779 F.2d 1287, 1293 (1985), there are four methods of establishing the reliability of confidential informants’ statements:

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<sup>3</sup> Gray acknowledges that when he waived his right to a full due process hearing, he waived his right to call witnesses.

(1) by oath of the investigating officer as to the truth of the report containing the statements, and the officer's appearance before the committee; (2) corroborating testimony; (3) a statement on the record by the committee chair of firsthand knowledge about the reliability of the informants; or (4) *in camera* inspection of the material documenting the investigator's assessment of the informants' credibility. *See also* WIS. ADM. CODE § DOC 303.86(4) (two confidential anonymous witness statements may be used to corroborate one another).

Here, the confidential statements were submitted for *in camera* inspection. We have carefully reviewed them, and conclude that they contain the requisite indicia of reliability. For example, several of the statements corroborate one another, and all the statements were given under oath.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5.,  
STATS.

